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## Confronting the Wizard of Oz: National Security, Expertise, and Secrecy

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## Article

### Confronting the Wizard of Oz: National Security, Expertise, and Secrecy

DAVID COLE

*Aziz Rana's account of the takeover of American national security by experts, and of the public's acceptance of that state of affairs, offers an important and novel perspective on what ails us in national security today. In this Comment, I suggest that while Rana is correct to identify our deference to experts as a central aspect of the problem, the problem is more complicated. First, the phenomenon of elite control over foreign and security policy questions is not new, but likely dates back to the founding—when elites ruled not based on expertise but on the basis of status, class, and legal barriers to more popular input. Second, deference to expertise is not just an ideological assumption of the modern age, but is also a rational response to greater threats and increased complexity. Third, deference may rest as much on secrecy as it does on epistemological assumptions about national security information. Because of classification, the general public often lacks not just expertise, but the very facts necessary to make an informed assessment.*

*That said, Rana's reminder of the importance of popular decision-making on national security policy is an important one. Unwarranted deference to experts (especially when they make judgments on secret information) not only undermines democratic legitimacy, but may induce poor decision-making, by facilitating groupthink and other biases. And most importantly, decisions about national security are never only about national security; they nearly always implicate other values, such as privacy, liberty, or human dignity. The national security experts have no expertise in assessing the normative questions that conflicts with these values raise. Those normative questions must be made by us all.*



## Confronting the Wizard of Oz: National Security, Expertise, and Secrecy

DAVID COLE\*

When I need to use the remote control for our television, I call my fifteen-year old son. It's not exactly that I am incapable of understanding the remote (or at least I don't think so). It's just that he's so much better at it, has so much more experience with it, and I use it so infrequently that I defer to his expertise. Aziz Rana's account of the American public's relationship to national security tells a similar story. The public, he argues, has deferred to the executive branch, and in particular to the national security agencies therein, on questions of security.<sup>1</sup> In his view, this deference reflects an epistemological shift, from a period when we viewed knowledge about security matters to be equally accessible by everyone, to the modern period in which we have delegated responsibility to a relatively small and insulated coterie of "experts" in the executive branch.<sup>2</sup> No constitutional concerns are implicated by my delegation of the remote to my son. But the public's delegation of national security matters to the so-called experts, Rana maintains, has profound implications for constitutional democracy.<sup>3</sup> Until we learn to use the remote, we will never be masters of our own destiny.

Rana's account of the epistemological underpinnings of the national security state offers an astute and novel perspective on a familiar story. Few would dispute that the national security agenda is today dominated by agencies in the executive branch.<sup>4</sup> Other scholars have identified different causes for this development. Many have pointed to such factors as the growth of the administrative state; the increasingly interventionist role the United States plays in the world; the rise of technological threats such as

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<sup>1</sup> Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1422–23 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1420–22.

<sup>4</sup> Actually, there are some who do dispute this. Former Vice President Richard Cheney, and his right-hand man David Addington, believe that the executive has been too hemmed in by legal restrictions since the Watergate and Vietnam era. Eric Lichtblau & Scott Shane, *Attorney General Held Firm on War Policies*, N.Y. TIMES, Aug. 28, 2007, at A1. Jack Goldsmith, who served as a top lawyer in the Bush administration, also maintains that the executive branch generally, and especially on matters of national security, has never before been so legally regulated and controlled. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 64–70 (2007). But this plainly is a minority view, and certainly seems to be have been belied by the actions of the Bush administration itself.

nuclear, chemical, and biological weapons; the spread of international terrorism; and the risks posed by the increasing interconnectedness of the globalized world.<sup>5</sup> But Rana adds a further dimension, attributing the evolution to a shift in how the American public thinks about national security. In his view, the modern era has erroneously accepted the view that security matters should be left to “the experts.”<sup>6</sup> Until we successfully challenge that assumption, he contends, legal reforms addressed to the problem are doomed to fail.<sup>7</sup>

Rana is right to focus our attention on the assumptions that frame modern Americans’ conceptions about national security, but his assessment raises three initial questions. First, it seems far from clear that there ever was a “golden” era in which national security decisions were made by the common man, or “the people themselves,” as Larry Kramer might put it.<sup>8</sup> Rana argues that neither Hobbes nor Locke would support a worldview in which certain individuals are vested with superior access to the truth, and that faith in the superior abilities of so-called “experts” is a phenomenon of the New Deal era.<sup>9</sup> While an increased faith in scientific solutions to social problems may be a contributing factor in our current overreliance on experts,<sup>10</sup> I doubt that national security matters were ever truly a matter of widespread democratic deliberation.

Rana notes that in the early days of the republic, every able-bodied man had to serve in the militia, whereas today only a small (and largely disadvantaged) portion of society serves in the military.<sup>11</sup> But serving in the militia and making decisions about national security are two different matters. The early days of the Republic were at least as dominated by “elites” as today. Rana points to no evidence that decisions about foreign

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<sup>5</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 11 (2010) (discussing the power of the executive branch to steer the agenda of the legislature or act unilaterally); Arthur Schlesinger, Jr., *Epilogue* to ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 420, 420–21 (2004) (stating that the powers of president to dictate foreign relations have grown unchecked in the last fifty years); GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENT AND THE NATIONAL SECURITY STATE* 1 (2010) (“Only one part of the government had the supreme power, the Bomb, and all else must defer to it, for the good of the nation, for the good of the world, for the custody of the future, in a world of perpetual emergency superseding ordinary constitutional restrictions.”); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1402–04 (1989) (discussing how the proliferation of nuclear weapons elevated the powers of the executive so as to respond to an emergency).

<sup>6</sup> Rana, *supra* note 1, at 1476.

<sup>7</sup> *Id.* at 1483.

<sup>8</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (arguing that the common people of the United States have a pivotal role in constitutional law).

<sup>9</sup> Rana, *supra* note 1, at 1426, 1448.

<sup>10</sup> *Id.* at 1452.

<sup>11</sup> *Id.* at 1437–38; see also Ann Scott Tyson, *Youths in Rural U.S. Are Drawn to Military*, WASH. POST, Nov. 4, 2005, at A1.

affairs were any more democratic then than now. And, of course, the nation as a whole was far less democratic, as the majority of its inhabitants could not vote at all.<sup>12</sup> Rather than moving away from a golden age of democratic decision-making, it seems more likely that we have simply replaced one group of elites (the aristocracy) with another (the experts).

Second, to the extent that there has been an epistemological shift with respect to national security, it seems likely that it is at least in some measure a response to objective conditions, not just an ideological development. If so, it's not clear that we can solve the problem merely by "thinking differently" about national security. The world has, in fact, become more interconnected and dangerous than it was when the Constitution was drafted. At our founding, the oceans were a significant buffer against attacks, weapons were primitive, and travel over long distances was extremely arduous and costly. The attacks of September 11, 2001, or anything like them, would have been inconceivable in the eighteenth or nineteenth centuries. Small groups of non-state actors can now inflict the kinds of attacks that once were the exclusive province of states. But because such actors do not have the governance responsibilities that states have, they are less susceptible to deterrence. The Internet makes information about dangerous weapons and civil vulnerabilities far more readily available, airplane travel dramatically increases the potential range of a hostile actor, and it is not impossible that terrorists could obtain and use nuclear, biological, or chemical weapons.<sup>13</sup> The knowledge necessary to monitor nuclear weapons, respond to cyber warfare, develop technological defenses to technological threats, and gather intelligence is increasingly specialized. The problem is not just how we think about security threats; it is also at least in part objectively based.

Third, deference to expertise is not always an error; sometimes it is a rational response to complexity. Expertise is generally developed by devoting substantial time and attention to a particular set of problems. We cannot possibly be experts in everything that concerns us. So I defer to my son on the remote control, to my wife on directions (and so much else), to the plumber on my leaky faucet, to the electrician when the wiring starts to fail, to my doctor on my back problems, and to my mutual fund manager on investments. I could develop more expertise in some of these areas, but that would mean less time teaching, raising a family, writing, swimming,

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<sup>12</sup> See Ed Crews, *Voting in Early America*, COLONIAL WILLIAMSBURG OFFICIAL HISTORY SITE, <http://www.history.org/foundation/journal/spring07/elections.cfm> (last visited Mar. 20, 2012) ("[B]y modern standards, the right to vote in colonial American was narrow, and there were fewer opportunities for its exercise.").

<sup>13</sup> CTR. FOR COUNTERPROLIFERATION RES., NAT'L DEF. UNIV., CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR TERRORISM: THE THREAT ACCORDING TO THE CURRENT UNCLASSIFIED LITERATURE 1 (2002).

and listening to music. The same is true, in greater or lesser degrees, for all of us. And it is true at the level of the national community, not only for national security, but for all sorts of matters. We defer to the Environmental Protection Agency on environmental matters, to the Federal Reserve Board on monetary policy, to the Department of Agriculture on how best to support farming, and to the Federal Aviation Administration and the Transportation Security Administration on how best to make air travel safe. Specialization is not something unique to national security. It is a rational response to an increasingly complex world in which we cannot possibly spend the time necessary to gain mastery over all that affects our daily lives.

If our increasing deference to experts on national security issues is in part the result of objective circumstances, in part a rational response to complexity, and not necessarily less “elitist” than earlier times, then it is not enough to “think differently” about the issue. We may indeed need to question the extent to which we rely on experts, but surely there is a role for expertise when it comes to assessing threats to critical infrastructure, devising ways to counter those threats, and deploying technology to secure us from technology’s threats. As challenging as it may be to adjust our epistemological framework, it seems likely that even if we were able to sheer away all the unjustified deference to “expertise,” we would still need to rely in substantial measure on experts.

The issue, in other words, is not *whether* to rely on experts, but how to do so in a way that nonetheless retains some measure of self-government. The need for specialists need not preclude democratic decision-making. Consider, for example, the model of adjudication. Trials involving products liability, antitrust, patents, and a wide range of other issues typically rely heavily on experts.<sup>14</sup> But critically, the *decision* is not left to the experts. The decision rests with the jury or judge, neither of whom purports to be an expert. Experts testify, but do so in a way that allows for adversarial testing and requires them to explain their conclusions to laypersons, who render judgment informed, but not determined, by the expert testimony.

Similarly, Congress routinely acts on matters over which its members are not experts. Congress enacts laws governing a wide range of very complex issues, yet expertise is not a qualification for office. Members of

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<sup>14</sup> See Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J. LAW & ECON. 1, 1–3 (2011) (discussing the “expert witness boom in antitrust and a handful of other areas over the last several decades”); M. Neil Browne et al., *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 1–4 (1998) (discussing the frequent use of expert witness testimony in litigation involving hazardous products); Michael H. Jester, *Patent Law Experts: Their Selection and Role in Patent Litigation*, INTEL. PROP. TODAY, Dec. 2004, at 32 (explaining importance of patent law experts in patent litigation).

Congress, like many political appointees in the executive branch, listen to and consider the views of experts to inform their decisions. Congress delegates initial consideration of most problems to committees, and by serving on those committees and devoting time and attention to the problems within their ambit, members develop a certain amount of expertise themselves. They may hire staff who have still greater expertise, and they hold hearings in which they invite testimony from still other experts. But at the end of the day, the decisions about what laws should be passed are made by the Congress as a whole, not by the experts.

A similar process operates in the executive branch. The President and Vice-President generally need not be experts in any particular field, and many of the cabinet members they appoint are not necessarily experts either. They are managers and policy makers. They spend much of their day being briefed by people with more specialized expertise than they have. But at the end of the day, the important decisions are made by politically accountable actors.

Thus, deference to experts need not preclude independent or democratically accountable decision-making. The larger problem may be one that Rana notes but does not sufficiently emphasize—an inordinate reliance on classified information and covert operations.<sup>15</sup> Secrecy is in many ways the ultimate enemy of democracy in the national security realm.<sup>16</sup> As Judge Damon Keith has written, “democracy dies behind closed doors.”<sup>17</sup> The experts in the intelligence community have the power to hide their decisions from external review and checks by classifying the information they consider or the actions they take.<sup>18</sup> Even if they do so in good faith, the inevitable result is that their actions are increasingly insulated from scrutiny by others and immune from democratic checks. Virtually everyone who has had access to classified information concedes that the system leads to massive over-classification.<sup>19</sup> Our overreliance on secrecy may well be more central to the problem of inordinate deference than assumptions about the nature of knowledge regarding security. And

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<sup>15</sup> See Rana, *supra* note 1, at 1475–76 (describing the vast secret security infrastructure in the United States).

<sup>16</sup> See DANIEL PATRICK MOYNIHAN, *SECRECY* 154, 165–66 (1998) (asserting that a culture of secrecy developed in response to concerns about the Communist Party, which resulted in a closed society that fell far short of democratic ideals and security programs that were inadequate and uncoordinated).

<sup>17</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (invalidating secret immigration hearing for detainee apprehended in the wake of terrorist attacks of September 11, 2001).

<sup>18</sup> See ELIZABETH GOITEIN & DAVID M. SHAPIRO, *BRENNAN CTR. JUST., REDUCING OVERCLASSIFICATION THROUGH ACCOUNTABILITY* 12 (2011) (explaining that original classifier—the first person to classify information—“are the only officials empowered to determine what information merits classification”).

<sup>19</sup> *Id.*; see generally DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* (2011).

in any event, the problems are mutually reinforcing. The inaccessibility of the information the experts rely upon compels us to defer to them because we lack sufficient grounds to question them. And that, in turn, may well make the experts more protective of their information and more likely to classify their actions, decisions, and considerations.

If this analysis is correct, then we must overcome not only the epistemological problem that Rana cites, but the problem of overreliance on secrecy as well. Experts can inform rather than supplant democratic decision-making only if we treat national security questions as appropriate for public deliberation, *and* if there is sufficient transparency to permit the decisions to be adequately informed.

Rana stakes his claim for change on democratic legitimacy. Leaving such important decisions to unelected “experts” cannot be squared with the democratic foundations upon which our society rests, he argues.<sup>20</sup> But there are at least two additional reasons, beyond democratic legitimacy, for resisting wholesale deference to the national security experts. First, many of the decisions that must be made in the security field involve more than questions of security. Surveillance issues, for example, almost inevitably involve a weighing of privacy interests against security concerns. Interrogation practices require us to balance the need for intelligence against interests in respecting human dignity and autonomy. Detention questions inevitably require a balancing of liberty and security. National security experts may well have expertise with respect to the security side of the equation on such questions, but there is no reason to think that they are experts in privacy, liberty, or human dignity. Indeed, precisely because of their specialized focus on security, they are ill-suited to weigh other concerns against security concerns. As Justice David Souter wrote in *Hamdi v. Rumsfeld*:<sup>21</sup>

In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately

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<sup>20</sup> Rana, *supra* note 1, at 1425.

<sup>21</sup> 542 U.S. 507 (2004).



raises. A reasonable balance is more likely to be reached on the judgment of a different branch . . . .<sup>22</sup>

How one strikes the balance between liberty and security is a decision that may be informed by experts, but is ultimately a *normative* question about the kind of society we want to live in—and that is quintessentially not a decision for experts, but for the people.

Second, even if we bracketed the oft-competing rights concerns, and all we cared about was effective security, deference to experts operating with secret information behind closed doors might well be counterproductive. Experts are in no way immune from groupthink and other decisional biases, and the smaller the circle of actors with the requisite knowledge to act, the less likely it is that such errors will be corrected.<sup>23</sup> Moreover, as the 9/11 Commission found, barriers to the sharing of information can greatly undermine the soundness of security strategies.<sup>24</sup> Stovepiping is an inevitable consequence of specialization and classification (because only those with a clearance and a “need to know” can then gain access to the information), and makes it less likely that even the experts themselves will have access to all the information relevant to their decisions.<sup>25</sup> Thus, greater transparency may be a benefit not merely from the vantage point of democratic legitimacy, as Rana illustrates, but also from the normative perspective of striking an appropriate balance, and from the pragmatic standpoint of improving security.

Rana calls our attention to some of the deep philosophical undercurrents that have come to define modern attitudes toward national security. The issues are too important to be left to experts, but until we challenge our assumptions about the propriety of doing so, he argues, no formal legal solution will succeed. I am sympathetic to Rana’s concerns, and seek to support his argument with the three principal points made here. First, it is critical to consider the particular role that secrecy, itself controlled by experts, plays in constructing and perpetuating “expertise,” and in shielding the experts from democratic assessment. Second, when it comes to weighing security against other values, such as privacy, liberty, and human dignity, the experts deserve skepticism, not deference. And third, security decisions themselves are often undermined by the barriers that secrecy and specialization raise. Like the Wizard of Oz, national security experts operate behind a large screen, and that screen bars us from

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<sup>22</sup> *Id.* at 545 (Souter, J., concurring in part, dissenting in part, and concurring in judgment).

<sup>23</sup> See Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301, 323 (2009) (arguing that security decision-making is often skewed by biases that might be counteracted through exposure to other perspectives and viewpoints).

<sup>24</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 416 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

<sup>25</sup> *Id.* at 417.

realizing, as Rana insists, that we are all capable of making the necessarily normative judgments about security and liberty that implicate not only the survival of our polity, but its survival in the form we choose.